United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1411

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To be argued by
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EUGENE F. MASTROPIERI

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

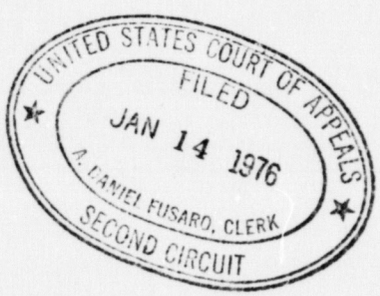
- against -

ROCCO MASTRANGELO and
JOSEPH ADDOLORIA,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

JOINT BRIEF FOR DEFENDANTS-APPELLANTS



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

DOCKET NO. 75-1411

Appellee,

- against -

ROCCO MASTRANGELO and
JOSEPH ADDOLORIA,

Appellants.

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Preliminary Statement

This is an appeal from judgments rendered on November 21, 1975, convicting the appellants after a trial by jury of all three counts of an indictment charging hijacking, conspiracy to hijack, and possession of a firearm during the commission of a hijacking. (18 U.S.C., sections 659, 371, 924 (c) (1) (2). The appellant Mastrangelo was sentenced to a term of up to seven years on the first count, and five years on the second count under 18 U.S.C. 4208(A)(2) both terms to run concurrently; and to a suspended sentence with five years probation on the third count to run consecutively. Joseph Addoloria was sentenced to a term of up to nine years on the first count, seven years on the second count under 18 U.S.C.A. 4508(A)(2) both terms to run concurrently, and to a suspended sentence and five years

probation on the third count to run consecutively (Platt, J., Trial and Sentence). The appellants are presently at liberty on bail pending appeal.

Questions Presented

1. Did the court below commit reversible error by allowing testimony of the appellants' participation in uncharged and subsequent hijackings and in allowing collateral immaterial evidence to support these assertions?

2. Should the instant indictment have been dismissed because of the undue delay occurring from the time of the incident to the time of the filing of the indictment?

3. Did the court below prejudice the appellants so as to deny them a fair trial by it's treatment of defense counsel?

4. Did the government fail to prove the appellants guilty of the crimes charged beyond a reasonable doubt?

STATEMENT OF FACTS

The Indictment

In an Indictment filed on April 8, 1975 the appellants Rocco Mastrangelo and Joseph Addoloria were charged while acting in concert with others, of hijacking a truck belonging to Arlene Knitwear Company of Brooklyn, New York on March 3, 1972 while said truck was in the process of interstate commerce with a load of women's knitted garments having a value in excess of one hundred ($100.00) dollars. In the second count the appellants were charged with conspiracy extending from January 1, 1972 to March 7, 1972 and relating to the very same transaction as the first count. In the third count they were accused of a violation of section 924 of Title 18 of the United States Code in that it was alleged that a firearm was used in the course of the hijacking of the Arlene truck.

The Evidence at the Trial

The Arlene Knitwear Hijacking

Luther Washington, a truck driver for Arlene Knitwear Co. stated that on March 3, 1972 he drove the company truck to the Troutman Street factory in Brooklyn to pick up a load of garments (T 723-726).* As he was pulling

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* T - Refers to Minutes of Trial.

out at about 9:30 a.m. a station wagon cut off his path and two men approached him (T 733, 735, 740). One held a gun and ordered him out of the truck and into the wagon. He was then driven around for about forty-five minutes until he was let off near a cemetary at Yellowstone Boulevard in Queens. He thereafter called police to report the incident (T 737, 740). Mr. Washington was unable to identify the appellants as participants in the crime (T 736). Richard Redman, an FBI agent for six and one-half years, testified that he was assigned to the Arlene hijacking on March 3, 1972 and that on March 7, 1972 he was notified that the truck in question had been located near Pier 48 on the Hudson River in New York (T 695, 697). Mr. Washington was brought to the scene and the condition of the truck was such that its compartment had been forced open and the alarm system torn out. A fingerprint check had failed to reveal any prints (T 701-704). Redman then stated that as a result of a discussion with a Paul Fleischer, a search of a home belonging to a Sol Broverman at 152 Barbey Street in Brooklyn was conducted on June 28 and July 17, 1974. The search revealed three boxes of womens garments (T 708, 711-715, 720). LARRY STEIN, the President of Arlene Knitwear in open court identified the three boxes and their contents as belonging to the company and as being part of the hijacking shipment of March 3, 1972. Stein stated that the load of goods had a value of $25,000. and were being shipped from New York to

other states (T 778, 782, 785, 787).

Proof of the Appellants' Involvement in the Arlene Hijacking

The People's proof regarding the appellants' involvement in the Arlene Knitwear hijacking rested entirely on the testimony of Paul Fleischer, a named co-conspirator in the indictment, but not a defendant, and a man who had been involved in various criminal activities for some sixteen years commencing when he was seventeen years old (T 59-61). Fleischer testified that from 1968 until 1974 he had been involved with three different and separate hijacking rings and that at various times he did jobs with one group or the other (T 67, 70, 74, 500, 504). In 1968 he had first joined a group consisting of Sam Wiener, Wally Krisa, Anthony DiGiovani, Bob Parthisias and Vincent Cresco. In 1971 he had met a group comprised of Lenny, Don, Mike, Louis and Jerry (T 70), [Fleischer stated he didn't know their last names (T 69)], and in January of 1972 he had first met a Charles Peters a member of the group specified in the instant indictment. According to Fleischer, Peters told him he was putting a new crew together and subsequently Fleischer met with Peters, Paul Flammio, Gerard Collins, Rocco Mastrangelo and Joseph Addoloria (T 73-74, 98). Fleischer stated that during the years 1968 to 1972 he had been working for Air Freight Haulage and was thus able to

obtain information regarding truck shipments and their loads. In addition he had arranged for a "drop" in New Jersey, a place owned by a Charles Forbes, where the hijacked trucks could be taken and unloaded (T 64, 76, 90, 95). Fleischer testified that beginning in January of 1972 and continuing for six weeks he had met the members of the Peters group at Flammio's house every week-day without fail at around 9:00 or 10:00 a.m. (T 93, 95-97). Fleischer stated that during the third week of February 1972 the group had decided to seize a truck belonging to Arlene Knitwear. The truck was discussed at the regular meeting and at which the appellants were both present (T 113, 114). It was decided to take the truck on March 3, 1972 and on the evening before it was agreed that Fleischer would drive the truck to Forbes place (FORCO) in New Jersey after he and Collins heisted it, and where Mastrangelo would be waiting to help unload. Addoloria was to count the number of cartons loaded on the truck at the Brooklyn depot and Peters would block the truck with his station wagon (T 119-124).

On the morning of March 3, 1972 Fleischer, Addoloria, Peters and Collins met at a diner in Brooklyn to await the arrival of the Arlene truck. Soon after according to Fleischer he and Collins approached the truck, and Collins ordered the driver out at gunpoint.* The driver was placed in Peters'

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* Luis Cuesta, a police clerical officer, testified that a check of their records revealed no gun permit for the defendants. (T 854).

station wagon (T 131-137) where he was driven around for awhile until left near a cemetary in Woodhaven, Queens (T 155). Fleischer stated that he drove the Arlene truck with Addoloria following in his car and that subsequently because of heavy rain* and traffic they decided to bring the truck to the Air Freight Haulage garage on 19th Street rather than to Forbes Place in New Jersey (T 138-140). At the 19th Street garage the attendant, Sam Weiner, was offered a "couple of bucks" for his cooperation and Addoloria then called New Jersey regarding the change in plans** (T 139-140). During their stay at the garage, efforts to open the truck doors caused the alarm to go off and necessitated the tearing out of all the truck wires (T 141-142). According to Fleischer, Mastrangelo and Flammio then arrived at the garage followed soon thereafter by Collins and Peters. Mastrangelo then placed a call to Forbes place in New Jersey in order to arrange for a tow truck to pull the empty Arlene truck from the vicinity and eventually a truck driver one Gene Barray arrived. According to Fleischer the Arlene truck was eventually dumped in Manhattan (T 152). Fleischer stated that Mastrangelo and Addoloria were present throughout the proceeding at the 19th Street garage and that Mastrangelo gave Weiner $200. for the use of the place (T 152). The

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* The government introduced a weather report to show .9 inches of rain on the day in question (T 848).

** The government produced two telephone company employees who stated that their records showed a telephone call to and from Air Freight Haulage to Forbes place in N.J. (1833,842).

witness then testified that during the next few days Mastrangelo and Flammio found a buyer for the load of merchandise taken from Arlene Knitwear and that on March 6, 1972 the goods were transported in a Ryder truck which had been rented by Collins under another name.* At the place of delivery however an argument ensued and only one-third of the load was disposed of for a price of $2300. (T 164-167). The rest of the goods were subsequently sold for a price of $7700.** and delivered a few days later to the home of a Sol Broverman at a Barbey Street address in Brooklyn (T 173, 182). Fleischer also stated that each one of the hijacking group including the appellants shared in the proceeds. Fleischer then related that due to difficulties with Peters he decided in June of 1972 to cooperate with the government and had been so doing until the date of trial (T 221-222, 375). Fleischer acknowledged receiving $1400. from the government and further admitted that he had been facing several charges carrying a possible maximum penalty of twenty years, when he decided to take a plea to one charge in return for a three year A2 sentence. The other charges had all been

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* The government produced Mr. Bruce Malcolm of Ryder Truck Rental who stated his records showed rental of a truck to a Harold Marden on March 6 and 10 of 1972. Mr. Marden then testified that his car and license had been stolen in 1971 and he denied ever renting a Ryder truck. Both men were unable to identify the appellants. (T 756, 761, 762, 765-768, 770).

** The government produced bank records of Broverman's accounts to show two cash withdrawals of $6000. and $1700. respectively on March 7, 1972 (T 825-826).

dismissed pursuant to a written agreement with the government in return for Fleischer's cooperation and testimony (T 63, 219-220, 223, 249, 678).

Proof of Other Crimes*

During the People's direct case the government introduced through Fleischer references that the appellants had been involved with Fleischer in other hijackings, committed both prior and subsequent to the one alleged in the indictment. Thus Fleischer stated that sometime during the second week of January 1972 he had arranged to take possession of twenty-six cartons of stolen merchandise belonging to Lerner Shops and that the appellants had knowledge of, assisted in and shared in the proceeds of that venture (T 104-106, 109). Fleischer also related the groups participation in a hijacking involving the Royal Merchandise Co. in February of 1972, Liz Cartage in May of 1972 and Splendid Form Brassiere Co. on May 10, 1972 (T 192, 198, 204). Fleischer stated that some of these shipments had been taken to a C & P Warehouse at 1471 Hempstead Turnpike in Hempstead, an alternate drop which was used for unloading (T 198). Fleischer also specifically stated the appellants

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* Fleischer's testimony and collateral supportive evidence regarding these other crimes not charged in the indictment were allowed over vigorous defense objections. The propriety of this ruling is the subject of Appellants' Point I, p. 12.

shared in the proceeds of this venture even though his information as to this appeared to be based entirely upon hearsay testimony of what Flammio was alleged to have told him (T 212). The government in its direct case then proceeded to produce witnesses to bolster Fleischer's testimony as to these other criminal transactions. Thus Howard Lowett, traffic manager of Splendid Form Brassiere Co., testified that a truck shipment had been stolen on May 5, 1972 (T 879-883) and FBI Agent William Klutz stated that the Splendid Form truck had been located in New Jersey some five and one-half miles from Forbes Place (Forco's) (T 889-891). Andrew Coniglio a private sanitation carter also testified that he knew Fleischer and that on May 31, 1972 he did a garbage hauling job for him at C & P Warehouse at 1471 Hempstead Turnpike, Hempstead, New York (T 859-865). John Connell the owner of the warehouse at 1471 Hempstead Turnpike testified that he rented the premises to Charley Peters on March 8, 1972 (T 940) (C&P Warehouse), and FBI Agent Gilkerson stated that he searched the warehouse premises at 1471 Hempstead Turnpike on September 1, 1972 and found items relating to the theft from LIZ Cartage Corp. (T 903-906).

The Defense

The appellant Addoloria rested after the presentation of the People's case. The appellant Mastrangelo took the stand and testified that he was fifty-five years old, married with four children and had never been convicted of any crime (T 996, 997, 1001). As a result of an accident Mastrangelo stated that he suffered from glacoma and had been unable to work steady since 1971. From 1971 until 1973 he had been doing odd jobs such as plumbing and carpentry to supplement the money received from workmens' compensation (T 1009, 1010, 1030). Mastrangelo acknowledged knowing Paul Flammio and his family as well as Joseph Addoloria, the three men being long time friends and neighbors (T 1014, 1015). He also stated that he had met Peters and Fleischer sometime in 1972 (T 1019) and had seen them occasionally at Flammio's house (T 1028). He denied however attending regular meetings at Flammio's house during the weekday mornings of January and February 1972 and he denied ever discussing any hijacking with any of the men (T 1020-1023). Mastrangelo further denied ever visiting the 19th Street garage of Air Freight Haulage, Barbey Street in Brooklyn, or in having any familiarity with either Forco Trucking Co. in New Jersey or C & P Warehouse in Hempstead (T 1043, 1036). The witness also denied ever

carrying a gun (T 1046). Mastrangelo stated that the first he heard of the alleged charges were upon his arraignment on the indictment in April of 1975 (T 1140).

Dr. Henry Ringelbaum, Mastrangelo's physician, testified that he had been treating the appellant for glacoma of the eyes for several years and that his records showed four visits to his office in 1972 (T 982). Then four character witnesses comprised of friends, neighbors and business acquaintances of the appellant testified to his good reputation for honesty, truthfulness and veracity (T 985, 987, 1060, 1066, 1179).

POINT I

THE COURT BELOW COMMITTED REVERSIBLE ERROR BY ALLOWING TESTIMONY OF THE APPELLANTS' PARTICIPATION IN UNCHARGED PRIOR AND SUBSEQUENT HIJACKINGS AND IN ALLOWING COLLATERAL IMMATERIAL EVIDENCE TO SUPPORT THESE ASSERTIONS.

Prior to trial the government indicated its intention to offer as part of their direct case proof of the appellants involvement in prior and subsequent hijackings not charged in the indictment. The government contended that this evidence would be offered to show a pattern of conduct and similar acts of the appellants. After receiving memorandum of law on behalf of both sides the trial court determined that the evidence in question was proper and admissible as showing a "common scheme or plan or design" (T 196). Thus at the very beginning of Fleischer's testimony the government brought forth the issue of the appellants' involvement in the possession of stolen goods from the Lerner Shop theft during the second week of January 1972 and the incident involving the Royal Merchandise Co. in February of 1972 (T 104, 106, 109). Later on the government elicited from Fleischer's testimony regarding the subsequent hijacking of Liz Cartage Co. and Splendid Form Brassiere Co. in May of 1972, some two months after the date of the instant

indictment involving Arlene Knitwear. The government then even went to the extent of producing five witnesses who had absolutely nothing to do with the Arlene case but who merely testified as to aspects of these other hijackings as a means of bolstering Fleischer's testimony. Thus Howard Lowett of Splendid Form testified that a truck belonging to his company was stolen on May 5, 1972 (T 879-883), FBI Agent Klotz testified that the Splendid Truck was found five and one-half miles from Forbes Place in New Jersey (T 889-891), Agent Gilkerson stated he found items relating to the Liz Cartage theft at the C & P Warehouse (T 903-906). Andrew Coniglio stated that he did a garbage hauling job for Fleischer at C & P Warehouse and John Connell the owner of the C & P premises testified he rented the warehouse to Charles Peters on March 8, 1972. (T 859-865, 940). The prior and subsequent hijacking alluded to by Fleischer could in no way be considered to be part and parcel of an overall intertwined scheme or design and the admission of the testimony was highly prejudicial to the appellants and constitute reversible error. The incidents involving Lerner Shops for example were not in the nature of a hijacking but the retention of stolen goods. In addition that incident and the one involving Royal Merchandise Co. were concluded even prior to the time of a discussion and decision

on the Arlene matter.* The Liz Cartage and the Splendid Form matters occurred some time two months after at a time when the original group of conspirators had been changed in membership** and operation. It is significant to note that the C & P Warehouse at 1471 Hempstead Turnpike of which substantial testimony was allowed, was leased to Peters on March 8, 1972, five days after the alleged Arlene hijacking. It is thus clear that the introduction of all of the foregoing evidence by the government did not show a common plan or scheme but was designed to prejudice the appellants in the eyes of the jury by proving bad character and by bolstering Fleischer's testimony on collateral immaterial matters. The prosecution clearly sought to have the jury draw an inference that the appellants were scoundrels and that Fleischer was credible on the main issues in contention by bolstering his testimony on collateral matters by extrinsic evidence.

Thus the prosecution in summation specifically referred to Fleischer's testimony regarding the other crimes and the collateral evidence to support it as "corroborating Fleischer's main testimony" (T 1272-1274).

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* Although the indictment charged a conspiracy with regard t the Arlene Truck beginning on January 1, 1972, Fleischer state that Arlene was first discussed in the third week of February (T 113).

** Cesare had allegedly joined the group (T 187-189).

The recently enacted rule 404(b) of the Federal Rules of Evidence provides that:

> "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may however be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistaken or accident."

The rule in effect codified the long standing case law in the area and continues the practice of weighing on a case by case basis the probative value of the offered evidence against its prejudice. (Weinstein on Evidence, Vol. 2, pg. 404-24, 404-66). Thus in United States v. DeCicco, 435 F.2d 478 (2nd Cir. 1970) this Court reversed a conviction for conspiracy to transport stolen goods and stated at page 484:

> "The chief government witness' testimony if believed leads ineluctably to the conclusion that the defendants knew what they were doing. . . .Therefore whatever probative value the prior crimes. . . added to the prosecution's case on the issue of defendants intent to commit the conspiracy here claimed was far outweighed by the unwarranted inference the jury was permitted to draw that the defendants. . . were a continuing band of art treasure thieves and fences."

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1972.

(See also United States v. Magee, 261 F.2d 607 (7th Cir. 1958); United States v. Byrd, 352 F.2d 570 (2d Cir. 1965); United States v. Phillips, 401 F.2d 301 (7th Cir. 1968); United States v. Fierson, 419 F.2d 1020 (7th Cir. 1969); Weinstein on Evidence, § 404(10), pg. 404-66, 67, 68.)

The probative value of the evidence in question was nil. The prosecution's case on the charges alleged in the indictment stood on its own if the testimony of direct involvement of the appellants as related by Fleischer was believed by the jury. Thus no legitimate purpose was served by the introduction of the evidence in question. The issue in contention as alleged in the indictment was the guilt or innocence of the appellants as to the hijacking of the Arlene Knitwear Truck.* Allegations of other crimes and extrinsic evidence to support these other crimes was collateral and immaterial and therefore inadmissible. Wigmore on Evidence, § 39, Third Edition, clearly enunciates the fundamental rule that:

> "No proposition can be evidenced except those which are properly in issue under the substantive law and the pleadings, hence, a fact evidencing a proposition not then properly in issue is inadmissible because immaterial."

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* Rule 401 of the Federal Rules of Evidence in speaking of relevant evidence speaks of a "fact that is of consequence." The fact in consequence in the case at bar was guilt or innocence of the crimes charged in the indictment.

(See also Wigmore on Evidence, 3rd Ed., §216,305; Richardson on Evidence, § 4, pg.3-4; Rule 401, Federal Rules of Evidence.) This rule involving proof of immaterial matters extends even to the point where though a defendant may be cross-examined as to collateral matters involving credibility, the cross-examiner may not call other witnesses or introduce other evidence to establish these collateral matters. Richardson on Evidence, 10th Ed., § 491, 498; Federal Rules of Evidence, Rule 608.

Thus in the case at bar the United States attorney would not have been able to bring in witnesses and evidence to contradict the appellants if they took the stand and denied any involvement in these other prior and subsequent hijackings. The government, however, in the case at bar accomplished on its direct case what it couldn't even do through cross-examination and impeachment. While the probative value was nil the prejudice to the appellants was great. Having the jury hear testimony as to a series of other hijackings and then listening to witnesses corroborate details of these other hijackings certainly denied the appellants a fair trial and a determination based solely on their guilt or innocence of the crimes charged. Throughout the admission of the foregoing prejudicial evidence defense counsel repeatedly objected and on numerous occasions requested a mistrial (T 878,891,923,956). Under these circumstances a new trial is warranted.

POINT II

THE LONG DELAY IN PROCEEDING TO AN INDICTMENT PREJUDICED THE APPELLANTS SO AS TO DENY THEM DUE PROCESS OF LAW AND A FAIR TRIAL.

The evils of undue delay in bringing prosecutions have been clearly recognized. Thus the United States Supreme Court in Toussie v. United States, 397 U.S. 112, specifically stated (in the context of the statute of limitations) a major evil of delayed prosecution:

> "This section is designed to protect individuals from having to defend themselves against charges when basic facts may have become obscured by passing of time and to minimize danger of official punishment because of acts in the distant past."

See also United States v. Ewell, 383 U.S. 116, 122; United States v. Marion, 404 U.S. 307; United States v. Scully, 415 F.2d 680 (2nd Cir., 1969); United States v. Daly, 454 F.2d 505 (1st Cir., 1972). Corpus Juris Secundum in discussing the reasons for barring stale claims states:

> "Such statutes are founded on the liberal theory that prosecutions should not be allowed to ferment endlessly in the files of government to explode only after witnesses and proof necessary to the protection of accused have by sheer lapse of time passed beyond availability 22 CJS 5 233, pg. 574."

Courts, keeping in mind the aim of statutes of limitations, have consistently construed them liberally in favor of defendants. United States v. Satz, 109 F. Supp. 94 (D.C.N.Y. 1952); 22 C.J.S., Criminal Law Section 224, p.575.

In United States v. Marion, the Supreme Court even indicated the possible applicability of the fifth and sixth amendment rights to due process of law and a fair trial where a defendant could demonstrate actual prejudice arising by the government's delay, and a purposeful design by the prosecution to gain a tactical advantage. This the Court held could occur irrespective of the Statute of Limitations. See also United States v. Napue, 401 F.2d 107 (7th Cir., 1968) cert denied 393 U.S. 1024. In the case at bar the indictment which was filed on April 8, 1975 alleged the commission of crimes in March of 1972, more than three years earlier. In addition it became clear at trial from the testimony of Paul Fleischer and others that Fleischer had been cooperating with the government since June of 1972 (T 261, 262, 270, 933) and had given statements to the government regarding his allegations against the appellants as far back as June of 1972.*

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* The lack of a pre-trial motion regarding the issue of undue delay is based upon the fact that it became known only at trial that the government way back in 1972 was in possession of facts upon which to proceed with an indictment. Once this was revealed defense counsel promptly and vigorously raised the issue (T 1196, 1197; Minutes of Mastrangelo's Sentence, pg.3-4).

Since the prosecution's case at trial was in essence based solely on Fleischer's testimony there is no legitimate reason why the government should have waited three years to initiate a prosecution.

Under the circumstances the only inference that can be drawn is that the government deliberately delayed so as to obtain a tactical advantage in violation of explicit judicial pronouncements. See United States v. Marion, 404 U.S. 307. The prejudice to the appellants were also severe. It must be recalled that because of the lapse of time the appellants were unable to reconstruct the critical day in question so as to recall where they were and what they were doing on the day of the alleged hijacking. Mastrangelo in particular frankly testified that he could not remember where he was on that day (T 1021, 1100). This very Court in United States v. Feinberg, 383 F.2d 60 (2nd Cir., 1967) at page 65 stated:

> "Though prejudice is not to be presumed it may well be that pre-arrest delay may impair the capacity of the accused to prepare his defense and if so such impairment may raise a due process claim under the fifth amendment (Powell v. U.S., 352 F.2d 705, 707) or a sixth amendment claim based upon the speedy trial guarantee, U.S. v. Simmon, 338 F.2d 806; U.S. v. Dickerson, 347 F.2d 784; Chapman v. U.S., 376 F.2d 705.
>
> For this reason we must inquire whether there is a plausible claim of prejudice from the delay in arrest. See Jackson v. U.S., 351 F.2 821, 823 (1965); such a claim may arise if a

> key defense witness or valuable evidence is lost. See Petition of Provoo, 17 FRD 183 203 (D.Md) aff'd. 350 U.S. 856, if the defendant is unable credibly to reconstruct the events of the day of the offense, see Jackson v. U.S., 351 F.2d 823, if the present recollection of the government or defense witness is impaired, Ross v. U.S., 349 F.2d 210 (D.C. Cal. 1965), because if any of the events occur the reliability of the proceeding for the purposes of determining guilt becomes suspect".

See also United States v. Giacalone, 477 F.2d 1277 (6th Cir., 1973).

In determining violations of the fifth amendment due process requirement with respect to long delays in commencing prosecutions, it appears from recent Supreme Court pronouncements that the "balancing test is applicable in which both the conduct of the prosecutor and the defendant are weighed." Barker v. Wingo, 407 U.S. 514, 530 (1972). In the case at bar the prosecution has established no legitimate valid reason for the delay in question and the appellants have amply demonstrated the prejudice inureing to them as a result of the government's acts. Under these circumstances the appellants' motion to dismiss the indictment should have been granted.

POINT III

THE COURT BELOW IN ITS TREATMENT OF DEFENSE COUNSEL PREJUDICED THE APPELLANTS AND DENIED THEM A FAIR TRIAL.

An examination of the Annotation on the Conduct of the Court in Rebuking Counsel in 62 ALR2d 166 reveals that there has been a consistent and forceful swing to the position that treating counsel with civility is more than an ethical desideratum; it is a legal right of the defendant, 62 ALR2d 181. Thus in Grock v. United States, 289 F. 544 (D.C. 1923) the court stated at page 545:

> "It is an important rule that an attorney at law appearing in open court in the trial of a case is entitled to such treatment from the court that the interests of his client may not be prejudiced. That is not a matter of indulgence, but of right."

In this regard the recent American Bar Association Standards relating to the Functions of a Trial Judge stress the need for judicial restraint in conduct and utterances (Rule 6.4).

In the case at bar, from the beginning of the trial until its conclusion, there appeared to have developed a degree of hostility by the trial judge toward Mr. Mastropieri,

the attorney for the appellant Mastrangelo. Thus during the course of the proceedings the court below imposed a fine on defense counsel of $100. (T 1382) and on numerous instances criticized him personally for his handling of the case both in front of and out of the presence of the jury. Thus the record reveals that the court accused Mr. Mastropieri of misrepresenting facts during a period of cross-examination (T 440, 443) of engaging in "improper conduct that could be referred to the bar association" (T 636, 637) and of confusing facts before the jury (T 682). The court at one point specifically told the jury:

> "Now this is the second time Mr. Mastropieri has done this and I caution you that the fact that Mr. Mastropieri asks such a question does not indicate that there is any basis for it and indeed there was apparently no such basis in this case.
>
> You have to be careful. The fact that he asks a question that incorporates a fact does not mean it is true unless confirmed by the witness. Twice now this has happened by Mr. Mastropieri where he had no business asking the question." (T 476)

These remarks served to belittle, humiliate, and intimidate defense counsel for Mastrangelo and had a spill over effect with regard to both appellants.

In United States v. Ah Kee Eng, 241 F.2d 157 (2nd Cir., 1957) this Court found reversible error when defense counsel was disparagingly treated in a manner similar to the case at bar. This Court stated at page 161:

> "While an appellate court should be loath to read too much into the cold black and white of a printed record, it cannot disregard numerous remarks from the bench of a nature to belittle and humiliate counsel in the eyes of the jury. . . .
> While the trial judge should be permitted considerable latitude in dealing with counsel,. . .he must not forget that the jury hangs on his every word and is most attentive to any indication of his view of the proceedings. Thus repeated indications of impatience and displeasure of such nature to indicate that the judge thinks little of counsel's intelligence and what he is doing is most damaging to a fair presentation of the defense."

(See also Allen v. United States, 115 Fed. 3 (9th Cir., 1902); Lau Lee v. United States, 67 F.2d 156 (9th Cir., 1933).

In Kraft v. United States, 238 F.2d 794 (8th Cir., 1956) the Eighth Circuit also reversed a case involving prejudicial and disparaging remarks to defense counsel and in so doing at page 801 cited the language of the Court in State v. Jensen, 186 N.W. 581:

> "The use by the trial judge in the presence of the jury of language which tends to bring an attorney into contempt before the jury has been held as sufficient ground for setting aside the verdict."

(See also 62 ALR 2d 220 § 21).

In United States v. Coke, 339 F.2d 183, 185 (2nd Cir., 1964) in an effort to preserve the fundamental right of a defendant to a fair and impartial trial unfettered by other influences, the court indicated that even if admonitions to defense counsel by the court were warranted a reversal would still be in order where the nature and manner of the court's corrective action were such that it must have improperly prejudiced the defendant in the minds of the jurors. See also Lambert v. United States, 101 F.2d 960 (5th Cir., 1939).

In the case at bar the court below also made no effort through instructions to inform the jury that they were not to consider the court's remarks to Mastrangelo's defense attorney as reflecting on the appellant Mastrangelo or on the other totally innocent party the appellant Addoloria. (See United States v. Boatner, 478 F.2d 737 (2nd Cir., 1973) cert denied 414 U.S. 848; United States v. Dellinger, 472 F.2d 340 (7th Cir., 1972) cert denied 410 U.S. 970.

Both appellants were substantially prejudiced by the court's remarks to and treatment of defense counsel for Mastrangelo. Under the circumstances a reversal of the judgment of conviction is warranted because both appellants were denied a fair trial.

POINT IV

THE PROSECUTION FAILED TO PROVE THE APPELLANTS GUILT BEYOND A REASONABLE DOUBT AND A JUDGMENT OF ACQUITTAL SHOULD HAVE BEEN DIRECTED.

To prevail in a criminal prosecution it is firmly established that the government is required to prove the defendants guilt beyond a reasonable doubt. Crawford v. United States, 375 F.2d 332 (1967); United States v. Johnson, 371 F.2d 800; United States v. McKenzie, 301 F.2d 880; United States v. Casey, 428 F.2d 229. The United States Supreme Court in the recent case of Mullaney v. Wilbur, 17 CrL 3063, emphasized the importance of the reasonable doubt standard in the context of our judicial system. The Court aptly stated at 17 CrL 3068: (June 9, 1975)

> "The requirement of proof beyond a reasonable doubt has a vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. . . .
>
> Moreover, use of the reasonable doubt standard is indispensable to the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."

If the evidence presented does not meet the requisite standard of proof the trial judge is obligated to grant a motion for a directed verdict of acquittal. Rule 29, Federal Rules of Criminal Procedure; United States v. Taylor, 464 F.2d 240 (2nd Cir. 1972).

From an examination of all the evidence in the case at bar it is clear that the government failed to meet the required standard of proof. Throughout the long trial no impartial witness was able to identify the appellants as having participated in the hijacking and no stolen goods were ever found on the possession of or on premises controlled by the appellants. Rather the government's entire case implicating the appellants rested upon the testimony of Paul Fleischer, a named co-conspirator, and long time hoodlum who without dispute had bargained with the government for leniency in return for his testimony. The United States Supreme Court in Crawford v. United States, 212 U.S. 183 (1909) recognized the weakness of the kind of testimony given by Paul Fleischer. The Court specifically stated:

> "The testimony of a confessed accomplice is less reliable than that of an ordinary witness of good character. . . .the evidence of such a witness ought to be received with the greatest care and caution."

An examination of Fleischer's testimony indicates numerous inconsistencies to such an extent as to make his testimony unworthy of belief. Fleischer, for example, first testified that at the meeting at Flammio's house he never played cards with Mastrangelo. Then at another point he changed his testimony to indicate he did play cards (T 97, 668). Further, Fleischer's bold assertion that the group including Mastrangelo met every weekday morning during January and February was totally disproved by the very fact that Fleischer himself had appeared in Federal District Court on the mornings of February 8 and 28th to answer other charges (T 285, 291). Fleischer's testimony also varied at times as to when he decided to bring the Arlene truck to the 19th Street station instead of to New Jersey. After stating at trial that it occurred on the bridge because of heavy rain and traffic it was revealed that in a prior statement given to the FBI he stated that the issue was discussed at the diner (T 650-651). Fleischer's testimony regarding the arrival of Peters and the others at the 19th Street garage at 12:00 P.M. also was in conflict with the testimony of Luther Washington that the hijacking occurred at 9:30 a.m. and that he was released from the station wagon at about 10 (T 643, 741).

It must also be noted that Fleischer, according to his own testimony, was still involved with two other groups of hijackers at the time of the alleged incident and that it appears from the record that both Arlene Knitwear and Splendid Brassiere Co. were subjects of other hijackings by these other groups (T 63, 72, 249). With respect to one of these groups Fleischer even stated he did not know the last names of the individuals in question, obviously exhibiting a desire to shield these particular acquaintances. The inference that Fleischer's other colleagues in crime were responsible for the charges in question and not the appellants is thus logically supported by the record. The thinness of Fleischer's allegations is further aptly demonstrated by the point made by defense counsel in his cross-examination of the witness, to wit, that if Fleischer had set up each of the jobs in question why would he be willing to cut in all the others and wind up receiving the paltry payments he testified to (T 621-625).

Further with regard to both appellants it must be recalled that even Fleischer's testimony did not place either one of the men at the actual scene of the hijacking at the time of the use of the firearm by Collins. (T 128, 136).

In addition with regard to Mastrangelo, ample testimony was presented through character witnesses as to the appellant's reputation for honesty, veracity and truthfulness and he himself took the stand to deny the allegations in question. The government's case though lengthy consisted only of Fleischer's testimony and all other evidence were merely of a bolstering nature to buttress things that Fleischer had said as to collateral matters. With respect to the main issue of the participation of the appellant in the Arlene hijacking only Fleischer's testimony was presented, and his testimony in light of the inconsistencies and his motive to lie is insufficient upon which to ground a guilty verdict thereby overcoming the presumption of innocence. Under the circumstances the motion to acquit should have been granted.

CONCLUSION

In a case where the government's evidence was weak, the appellants were denied a fair trial by various actions and rulings of the court below. The judgment of conviction should therefore be reversed and a new trial ordered.

Dated: Kew Gardens, New York
January 9, 1976

Respectfully submitted,

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Joint Brief

IS HEREBY ADMITTED.

DATED:

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Attorney for